

**Statement of Joan Claybrook,
President, Public Citizen,
On Regulatory Accounting and the
Office of Management and Budget's 2004 Draft Annual Report
to Congress on the Costs and Benefits of Federal Regulations**

**United State House of Representatives
Committee on Government Reform
Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs
Washington, D.C.
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Mr. Chairman and Members of the Committee:

I am pleased to offer this testimony on regulatory accounting and the Office of Management and Budget's (OMB's) 2004 Draft Annual Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities. I am President of Public Citizen, a national public interest organization with 160,000 members nationwide that represents consumer interests through lobbying, litigation, regulatory oversight, research and public education. For 33 years, Public Citizen has had direct, practical involvement with a wide variety of federal health and safety protections and has represented consumer groups, labor unions, worker groups, and public health organizations in standard-setting proceedings and in litigation involving the Occupational Safety and Health Administration [OSHA], the Environmental Protection Agency [EPA], the Food and Drug Administration [FDA], the Consumer Product Safety Commission [CPSC], the U.S. Department of Agriculture [USDA], the National Highway Traffic Safety Administration [NHTSA], the Federal Motor Carrier Safety Administration [FMCSA] and other health and safety agencies.

The subject of my testimony today is the 2004 draft annual Report to Congress by the Office of Information and Regulatory Affairs [OIRA] within the Office of Management and Budget on the Costs and Benefits of Federal Regulations. The Report continues to be published despite a growing body of evidence that establishes the utter bankruptcy of regulatory accounting as a useful tool for public policy. Public Citizen continues to object to the use of regulatory accounting and views each successive cost/benefit Report to Congress as increasingly hostile to good government and the well-being of the public.

In support of these objections, I will cite four major new publications and studies that should both significantly enhance public understanding of the factual deficiencies and conceptual fallacies that underlie cost/benefit accounting, and expose the distortion of scientific information that is increasingly poisoning regulatory analysis. Next, I will describe what is missing from OMB's Reports to Congress, information without which neither Congress nor the public can fairly evaluate the effects of federal regulatory activity. Finally, I will conclude my testimony by expressing our opposition to OMB's solicitation of nominations for changes to regulations affecting the manufacturing sector.

We believe this is nothing more than a deregulatory “hit list” similar to the discredited effort of two years ago.

I. The Track Record of Regulatory Accounting Shows It is a Resounding Failure.

In prior testimony, I described our opposition to the practice of regulatory accounting. This practice involves monetizing and totaling both the costs and benefits of disparate public protections and then subtracting one from the other. The result is presented as a “net sum” which assesses the worth of all federal health, environmental and safety protections.

Because of the inherent and highly subjective limitations of cost/benefit methodology, it can never provide meaningful information. While this Subcommittee may want to insist on a more comprehensive accounting, we believe such a project is deeply misguided as well as a practical impossibility. Energy would be better directed toward agencies’ fulfillment of their statutory duties to the public as assigned by Congress.

Proponents of regulatory accounting would use aggregated cost and benefit figures as the first step towards a “regulatory budget,” in which federal agencies would have to compete with each other in order to impose a tightly-controlled amount of costs upon the private sector. If costs to the private sector exceed the cap established in the budget, it is suggested, some agency rules might have to be eliminated and new rules could not be issued, no matter how pressing the need.

The pilot projects called for in H.R. 2432, the Paperwork and Regulatory Improvements Act of 2003, would be the first step toward establishing the regulatory budget. This is a deeply mistaken effort that should end even before it begins. One need look no further for the underlying purpose of the project than to notice that the agencies singled out for the pilot projects are those that protect the environment and promote safety in the workplace and on the highways. The public in overwhelming majorities supports these consumer and environmental protections.

Yet, as has been repeatedly demonstrated, corporations will act in their own short-term best interests to maximize profit. Governmental regulation has always been and remains necessary to stop the unfettered despoilment of public lands and to protect the public health and safety from corporate negligence.

Regulatory accounting suffers from fatal flaws that make it useless for any purpose other than lending a false appearance of technical objectivity to a political decision to benefit regulated interests over the public’s interest. Among the more fundamental of those flaws are the following:

- It involves a pretense that accurate and reliable data are presented on both sides of the ledger, when they are not and cannot be.

- Its intellectual underpinnings are dishonest. Authors of the most fundamental studies advanced in support of cost/benefit analysis substituted their own numbers in place of government data and/or included estimates of fictional regulations that were never enacted or, in some cases, never even proposed by any government agency to reach the desired conclusion.
- The conclusions are highly manipulable because they are based on a raft of often unsupported assumptions, a change in any one of which could affect the outcome.
- It is biased toward eliminating regulations opposed by industry because cost calculations are based on estimates provided by industry that are often highly inflated and rarely retrospectively or concurrently validated by the agencies.
- It is historically incorrect: regulation can produce benefits that help industry by limiting the risk, and forcing the development of, innovative products and processes.
- Both costs and benefits must be quantified, with the result that the many unquantifiable benefits are simply eliminated from consideration - even when those are the very benefits that the government action was intended to produce.
- In an effort to “monetize” all benefits, it devalues the longest lasting benefits and produces results repugnant to a democratic society, such as assigning different dollar values to the lives of different categories of citizens and disregarding responsibility for succeeding generations.
- It is a significant waste of public resources, particularly for those agencies charged with protecting the public health, which are already starved for funds.
- The practice is profoundly out-of-step with the necessary protective role of government as a check upon market excesses, which the American public has witnessed in abundance in recent years.

Even with all the intrinsic distortions of regulatory accounting, OMB’s Reports to Congress have established one thing: the benefits of federal regulations far outweigh the costs. If the point was to assess the value produced by federal regulatory activity, we could stop now, confident in the effectiveness of a framework under which Congress establishes public policy and the agencies, with public participation, work out the necessary details of implementation. Unfortunately, the real objective appears to be to subvert that framework.

A. *OMB’s 2004 Draft Report to Congress Perpetuates the Underlying Limitations of Regulatory Accounting and Demonstrates the Manipulability of the Numbers.*

As has become customary with OMB’s Reports to Congress, the 2004 draft

Report begins by perfunctorily acknowledging its serious shortcomings:

- Monetized costs and benefits could be calculated for only six rules, half of the 12 “social regulations” to which OMB has chosen to limit its report.¹
- In many instances, agencies were unable to quantify all benefits and costs. The monetized estimates that OMB presents necessarily exclude the unquantified benefits.²
- It is difficult to estimate and aggregate the costs and benefits of different regulations over long time periods and across many agencies using different methodologies. Any such aggregation involves the assemblage of benefit and cost estimates that are not strictly comparable.³
- The benefits of a reduced risk of terrorism have proven very difficult to quantify and monetize.⁴

Despite its admission of the incompleteness and unreliability of the data, OMB nonetheless proceeds to present what it calls “Estimates of the Total Annual Benefits and Costs of Major Federal Rules” for two time periods, the year ending in September 2003 and the ten year period from October 1993 to September 2003. What is perhaps most remarkable about these aggregate numbers is how different the 10 year benefit total is in the 2004 Report in comparison to the 10 year total presented in the 2003 Report to Congress.

2004 Report: October 1993 to September 2003 (in millions of dollars)

Benefits: \$62,091 - \$168,098 Costs: \$34,156 - \$38,958⁷

2003 Report: October 1992 to September 2002 (in millions of dollars)

Benefits: \$146,812 - \$230,896 Costs: \$36,625 - \$42,813⁸

¹ “Informing Regulatory Decisions: 2004 Draft Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities” [2004 draft Report], p. 3.

² Id. For example, nonmonetized benefits of EPA’s Standards for Concentrated Animal Feeding Operations include reduced contamination of coastal and estuarine waters, reduced pathogen contamination of groundwater, reduced human and ecological risks from antibiotics, hormones, metals, and salts, improved soil properties, etc. Id., p. 15, Table 4.

³ Id. OMB states that it expects costs and benefits to become more comparable across agencies and programs as agencies adopt the recommended best practices in the regulatory analysis that took effect on January 1, 2004. If this happens, it will merely represent a consistent use of a defective calculus. Moreover, instead of helping agencies understand how to meet existing analytical requirements, OMB has introduced a new level of complexity. For rules involving annual economic effects of \$1 billion, agencies will now be required to “try to provide some estimate of the probability distribution of regulatory benefits and costs.” OMB Circular A-4, Regulatory Analysis, p. 40. Strikingly, a note of caution was sounded by anti-regulation law professor Kip Viscusi who, in the role of peer reviewer, expressed concern that the emphasis on probability distribution “may lead to dismissal of risks that cannot be proven conclusively” and made the point that “[i]f risks are required to be shown to be statistically significant based on classical tests, then we should close down our homeland security operation because its policies will never pass such a test.”

⁴ Id., p. 5.

⁷ Id., p. 5, Table 2.

⁸ “Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities,” Office of Management and

For the 10 year period covered in the 2004 draft Report, the cost figures are roughly comparable, but the benefits have decreased dramatically. OMB accomplished this drastic reduction on the benefit side by eliminating the \$80 billion per year of benefits produced by the sulfur dioxide limits of the acid rain rules. OMB's explanation for dropping these benefits is that the rule dates to 1992 and so now falls outside the 10 year period that OMB has chosen to include in its report.

Of course, the rule did not abruptly stop producing benefits on September 30, 1993. This highlights one of the analytical problems with this process. Costs are often incurred in a relatively short period of time and are comparatively measurable. Benefits, on the other hand, can be experienced over a considerable period of time. Thus, presenting cost/benefit information in 10 year intervals can weight costs more heavily and cause benefits to disappear. What is the point of the 2004 "total" cost/benefit table except to mislead the public about the relative benefits produced by federal regulatory activity?

The malleability of the numbers produced by regulatory accounting is also highlighted by OIRA Administrator Dr. John Graham's about-face regarding the cost estimates produced by Mark Crain and Thomas Hopkins¹⁰, which are cited in Finding 5 of H.R. 2432 and used in the 2004 Draft Report to justify OMB's invitation to create a new "hit list" of regulations affecting the manufacturing sector that should be delayed, weakened or killed.

When he appeared before the Committee in July, 2003, Dr. Graham left no doubt about his opinion of the usefulness of the Crain and Hopkins study. To support his argument, with which we agree, that it is not workable to require an estimate of the costs and benefits of all existing rules and paperwork requirements, Dr. Graham criticized the study in these terms:

The fact that attempts to estimate the aggregate costs of regulations have been made in the past, such as the Crain and Hopkins estimate of \$843 billion mentioned in Finding 5, is not an indication that such estimates are appropriate or accurate enough for regulatory accounting. Although the Crain and Hopkins estimate is the best available for its purpose, it is a rough indicator of regulatory activity, best viewed as an overall measure of the magnitude of the overall impact of regulatory activity on the macro economy. The estimate, which was produced in 2001 under contract for

Budget, Office of Information and Regulatory Affairs, p. 7.

¹⁰ W. Mark Crain and Thomas D. Hopkins, "The Impact of Regulatory Costs on Small Firms", Report for The Office of Advocacy, U.S. Small Business Administration," RFP No. SBAHQ-00-R-0027 [Crain and Hopkins Study].

the Office of Advocacy of the Small Business Administration, is based on a previous estimate by Hopkins done in 1995, which itself was based on summary estimates done in 1991 and earlier, as far back as the 1970s. The underlying studies were mainly done by academics using a variety of techniques, some peer reviewed and some not. Most importantly, they were based on data collected ten, twenty, and even thirty years ago. Much has changed in those years and those estimates may no longer be sufficiently accurate or appropriate for an official accounting statement. Moreover, the cost estimates used in these aggregate estimates combine diverse types of regulations, including financial, communications, and environmental, some of which impose real costs and others that cause mainly transfers of income from one group to another. Information by agency and by program is spotty and benefit information is nonexistent. These estimates might not pass OMB's information quality guidelines.¹¹

Amazingly, less than seven months later, this same report is described by Dr. Graham in the 2004 Draft Report as a "recently sponsored" study, "[a]mong the more recent and comprehensive sources of estimates of the overall burden of regulation on specific economic sectors."¹² Although Dr. Graham correctly points out that the Crain and Hopkins data do not indicate whether reducing regulatory requirements on small firms would produce net positive benefits, he nonetheless cites the study in support of his solicitation of nominations of regulations affecting the manufacturing sector to be cut back.

As Dr. Graham said last July, the only thing new or recent about the Crain and Hopkins study is that incomplete and inaccurate data from years ago has been updated to account for inflation. But this merely serves to exaggerate the underlying distortions that are embedded in this type of estimate. Moreover, even Dr. Graham's sweeping enumeration of the problems with the Crain and Hopkins study does not reveal all of its shortcomings. For example, the cost estimates on workplace regulations used by Crain and Hopkins come from a 2001 study by Joseph Johnson of the Mercatus Center.¹³ In their painstaking and in-depth look behind the research on regulatory costs, Thomas McGarity and Ruth Ruttenberg found major weaknesses in Johnson's data.¹⁴

It turns out that the Johnson research begins with the original cost estimates provided to OSHA by representatives of affected industries, makes no attempt to evaluate these estimates retrospectively or adjust for possible bias in the source of information, and then subjects the resulting total to a "multiplier" of 5.55, meant to represent the additional cost of non-major regulations and fines imposed by OSHA. This "multiplier" in turn comes from a 1996 report by a postdoctoral fellow at the Center for the Study of American Business (now Weidenbaum Center) who took it from an unpublished and

¹¹ H.R. 2432, Paperwork and Regulatory Improvements Act of 2003, July 22, 2003 Transcript, p. 21.

¹² 2004 Draft Report to Congress, pp. 26 and 52.

¹³ Crain and Hopkins Study, p. 12.

¹⁴ Thomas O. McGarity and Ruth Ruttenberg, "Counting the Cost of Health, Safety, and Environmental Regulation," 80 Tex. L. Rev. 1997 (2002), p. 2017.

otherwise unavailable and undocumented 1974 estimate provided by the National Association of Manufacturers. Thus, a figure that includes fines paid for violating existing law is now being put forward by the government as evidence of excessive regulatory burden.

B. There is a Growing Body of Evidence Establishing the Defects of Regulatory Analysis as it Is Currently Practiced Under OMB's Direction.

Four recent publications and studies document the inaccurate and ultimately meaningless data regarding regulatory costs, the specious rubric that underlies cost/benefit analysis, and the increasing threat to the integrity of the scientific information used by regulatory agencies.

1. Not Too Costly, After All: An Examination of the Inflated Cost-Estimates of Health, Safety and Environmental Protections.

In prior testimony, I referred to a pre-publication draft of an exhaustive study prepared by Ruth Ruttenberg and Associates, Inc.,¹⁵ examining the reasons that federal agencies regularly and admittedly overestimate regulatory costs, thus weighting the scales of cost-benefit analysis against regulation. The report is now complete and I am pleased to provide the Committee with copies of “Not Too Costly, After All: An Examination of the Inflated Cost-Estimates of Health, Safety and Environmental Protections.”¹⁶

Looking back over a thirty year period, Ms. Ruttenberg examines over 28 regulations and finds that cost exaggerations are the result of three inherent flaws in agency practice. First, cost information is normally provided to agencies by regulated industry, which has financial incentives to skew the cost-benefit analysis against the proposed regulation. Informational surveys on cost are often limited to a small number of companies, meaning that the results may not be representative of industry as a whole. This problem is compounded by the fact that industry data sources are often confidential, making it difficult or impossible to verify their factual validity. Moreover, there are very limited sources, other than regulated industries, from which agencies can obtain cost information and it is costly to acquire.

The second major flaw is the agencies’ tendency to base estimates on conservative and/or inappropriate assumptions. Numerous problems present themselves in attempting to determine cost, the resolution of which invariably reflects the decision maker’s bias. For example, it may be difficult to distinguish regulatory compliance costs and other capital expenditures by the company, or to avoid double counting regulatory

¹⁵ Ruth Ruttenberg, Ph.D., is an economist with 28 years of experience on the economics of regulation. She has been a senior economist at OSHA, a consultant to OSHA, EPA and the Congressional Office of Technology Assessment, and regularly testifies before the U.S. Congress and federal regulatory agencies and advisory bodies.

¹⁶ Ruth Ruttenberg and Associates, Inc., “Not Too Costly, After All: An Examination of the Inflated Cost-Estimates of Health, Safety and Environmental Protections,” Public Citizen Foundation, Inc., 2004 [“Not Too Costly”].

costs when more than one regulation is involved. Problems also arise in measuring incremental cost differences between what would have been spent prior to regulation and what must be spent after regulation.

Finally, agencies apply only static market analysis, failing to consider new and innovative ways that industry can, and regularly does, comply with new regulations. Yet there is substantial evidence that new processes and improved products are the result of new regulation and create subsequent new profits for the company. Also, cost estimates often fail to consider the offsetting economic gains caused, for example, by the license and sale of pollution abatement equipment or the avoidance of problems arising later in the marketplace. Similarly, cost savings resulting from safer substitutes and the elimination of hazards are often omitted from regulatory cost estimates.

All of these omissions and distortions impoverish the usefulness of cost-benefit analysis and result in cost figures that are significantly inflated.

2. Priceless: On Knowing the Price of Everything and the Value of Nothing

A most welcome addition to the literature about regulatory analysis is the newly published book by law professor Lisa Heinzerling and economist Frank Ackerman.¹⁷ For too long, Professor Heinzerling's groundbreaking work has been known only to a limited audience of academics, and others professionally concerned with regulatory affairs. Confident that they can continue to beguile the public with the appearance of technical expertise, proponents of regulatory accounting have continued to press their case despite Professor Heinzerling's revelations.

In this accessible book written with elegance and humor, Professors Heinzerling and Ackerman make it possible for a wider audience to learn about the myths that underlie cost/benefit analysis. Now, when the assertion is made that federal regulations are causing the "statistical murder" of 60,000 Americans every year, more people will be equipped with the knowledge that 79 of the 90 regulatory measures included in the Tenga and Graham study that is the source of that mythical number never actually existed.

The authors explain how OMB forced the Environmental Protection Agency (EPA) to engage in a bizarre attempt to monetize the fish in the sea in order to justify requiring power plants to incur costs to reduce the number of fish killed by their intake cooling systems. In order to present a cost/benefit analysis, EPA had to find a dollar value for the fish. Only a small number of the fish, those that were caught and sold in the marketplace, had a readily ascertainable commercial value. Others, through a tortured

¹⁷ Frank Ackerman & Lisa Heinzerling, "Priceless: On Knowing the Price of Everything and the Value of Nothing," [Priceless], The New Press, 2004. Lisa Heinzerling is a professor at Georgetown University Law Center specializing in environmental law. She was a law clerk to Judge Richard Posner and Justice William Brennan and has represented environmental groups and state agencies in numerous legal battles. Frank Ackerman is an economist at the Global Development and Environment Institute at Tufts University, the author of "Why Do We Recycle?" and a contributing author to the 2001 report of the Intergovernmental Panel on Climate Change.

process, could be assigned a value to represent their worth to recreational fishers. Just this quantifiable catch figured in EPA's analysis. No value at all was assigned to fish that people do not try to catch or even to the commercially desirable fish that escaped capture, whose continuing existence ensures that there will be a catch next year.

A simple example is used to illustrate both the absurdity of treating human lives as if they were financial investments and the arbitrariness of the resulting numbers:

If cancer were the same as money, one could equally say that one hundred cancer cases expected twenty years from now have a present value of only fifty-five cancers today at a 3 percent discount rate, or only twenty-six cancers today at 7 percent. Don't laugh yet: this is exactly what is done in contemporary cost-benefit analyses.¹⁸

People do not value human life this way. When the public became aware of the "senior death discount" (known to Dr. Graham as an "age-adjustment factor" used as part of alternative benefit analyses) their outrage was so great that OMB was forced to abandon the practice of assigning a lesser dollar value to older people.¹⁹ It can be anticipated that Americans who read this book will be as offended by economists' dismissive assumptions and infuriated at their government's acceptance of such repugnant methodology.

3. Grading the Government

Building on Professor Heinzerling's pioneering work, law professor Richard W. Parker has taken a microscope to three influential sets of studies that are often cited in support of the argument that federal regulations are excessively costly.²⁰ Professor Parker uses the term "scorecard" to describe the presentation of regulatory cost and benefit information in summary statistical form, that is often reduced to a single "cost-per-life-saved" figure.

The three scorecards that Professor Parker exhaustively examines are: the 1987 table created by OMB economist John Morrall, suggesting a cost-per-life-saved of \$72 billion; two studies by John Graham and Tammy Tengs at the Harvard Center for Risk Analysis, one showing a range of cost-per-life-saved from federal regulations of less than zero to \$1 trillion; and the other positing that 60,000 additional lives could be saved each year if money were spent on different interventions; and Robert Hahn's 2000 update of his 1996 study claiming that fewer than half of all federal regulations pass "a neutral economist's benefit-cost test."

¹⁸ Id., p. 188.

¹⁹ Memorandum to the President's Management Council from John D. Graham, Ph.D., May 30, 2003.

²⁰ Richard W. Parker, "Grading the Government," 70 U. Chi. L. Rev. 1345 (2003). Richard W. Parker is a professor at the University of Connecticut School of Law, where he teaches Environmental Law, International Environmental Law, and the International Law of Trade and Environment. In addition to his career in teaching, Professor Parker has served as Special Counsel to the Deputy Administrator of the U.S. Environmental Protection Agency and Assistant General Counsel in the Office of the United States Trade Representative.

Professor Parker finds all three scorecards to be rife with errors, which he divides into two categories, avoidable errors and ones that are inherent in the process. In the avoidable error category, all three sets of studies are found to contain undisclosed data and non-replicable calculations, guesses presented as facts, and gross under-estimates of the number of lives saved and/or their value. Morrall altered agency estimates by several orders of magnitude in some cases. Hahn also adjusted agency figures, excluded many benefits, used his own discount rates, and set an arbitrary baseline year of 1996.

Professor Parker's requests for access to the Tengs/Graham worksheets were denied, making replication of their work impossible. Their sample was limited to studies for which estimates for full-implementation costs and benefits had been produced, with the result, for example, that only seven of thousands of regulated toxic chemicals were included.

The catalog of errors that "appear to be endemic to the scorecard enterprise," includes exclusion of unquantified costs and benefits (and of many quantified benefits, as well), disregard of distributive and equitable impacts, and failure to reveal the actual level of uncertainty in the analysis.

The annual OMB Reports to Congress present scorecards of this type and suffer from all the defects exposed in the article.

4. Scientific Integrity in Policymaking, An Investigation into the Bush Administration's Misuse of Science

When Dr. Graham appeared before the Committee last July, he disclosed a "strategy of trying to induce more sound science as a check on regulatory power" and said "[w]e have to have more science and peer review check from the outside community on the power at agencies ..."²¹

The Administration's strategy of using science to "check" agency power is the subject of a report released this month by the Union of Concerned Scientists.²² In chapter after chapter, the report describes a pattern of suppression and distortion of scientific findings, manipulation of the scientific advisory system to silence opinion not in line with Administration policy, and censorship of government employees.

The scientists caution that distorting the scientific underpinnings of the policymaking process "runs the risk that decision makers will not have access to the factual information needed to help them make informed decisions that affect human health, public safety, and the wellbeing of our communities."²³

²¹ H.R. 2432, Paperwork and Regulatory Improvements Act of 2003, July 22, 2003 Transcript, pp. 17 and 41.

²² Union of Concerned Scientists, "Scientific Integrity in Policymaking, An Investigation into the Bush Administration's Misuse of Science," (2004), http://www.ucsusa.org/global_environment/rsi/report.html.

²³ *Id.*, p. 4.

In furtherance of his stated goal of using peer review to “check” agency power, Dr. Graham issued a proposed Peer Review Bulletin in September 2003.²⁴ Peer review is a process commonly used to confirm that new research conforms to accepted scientific method. It is widely used in various forms by federal agencies that address scientific and technical research in their work.

What Dr. Graham has in mind, however, is a form of peer review unknown to the scientific community. His proposal would impose a new set of requirements on all federal agencies. All scientific and technical information would have to go through peer review before it could be disseminated to the public. The bulletin creates a new category of “especially significant information” that would have to be reviewed by external peer review panels, put together under selection criteria that are patently skewed in favor of industry-funded scientists and against publicly-funded scientists.

This is an unprecedented interference in the regulatory system that, if implemented, will effectively stymie all attempts to address both known and newly identified threats to societal wellbeing. Tellingly, Dr. Graham provides no assessment of the costs or purported benefits of his proposal and does not identify a single example of an agency action that would have been improved by the process he advocates.

In Ackerman and Heinzerling’s words in the conclusion of Priceless:

Cost-benefit analysis of health and environmental policies trivializes the very values that gave rise to those policies in the first place. Moreover, through opaque and intimidating concepts like willingness to pay, quality-adjusted life-years, and discounting, economic analysts have managed to hide the moral and political questions lying just under the surface of their precise and scientific-looking numbers. It is time to blow their cover.²⁵

II. OMB’s 2004 Draft OMB Report to Congress Ignores the Costs to the Public of Weakened and Blocked Regulations

Further undermining the usefulness of the cost/benefit Report as a picture of federal regulatory activity is its failure to account for the following:

- The use of regulatory analysis to delay and distort new safety protections, such as the tire pressure monitoring and hours of service rules discussed below (paralysis by analysis).
- OMB’s use of its reviews of draft regulations to decrease public health and safety protections that were or might have been proposed by regulatory agencies.

²⁴ Proposed Bulletin on Peer review and Information Quality, 68 Fed. Reg. 54023 (2003), http://www.ucsusa.org/global_environment/rsi/report.html

²⁵ Priceless, p. 234.

- The increasing harm to the public that is being caused by the systematic delay and weakening of scores of health, safety and environmental protections.
- A. *Regulatory Analysis is Being Used to Undermine Congressionally Mandated Public Safety Measures, but OMB Repeatedly Fails to Disclose the Mounting Costs to the Public.*
1. The Tire Pressure Monitoring Systems Rule

Two years ago, I attached to my testimony before the Committee a copy of Public Citizen's letter to Dr. Graham objecting to his decision to "return" the draft final rule on tire pressure monitoring systems [TPMS] required by the TREAD Act. At that time, I informed Dr. Graham that his attempt to force NHTSA to adopt a proposed rule based on his manipulated analysis amounted to obstructing the intent of Congress. In August 2003, in a ruling in a case brought by Public Citizen and others, the Second Circuit Court of Appeals agreed.²⁶ Dr. Graham has not accounted for the costs of his interference in either the September 2003 Report to Congress or the draft 2004 Report. He does not mention the litigation in either report and leaves out of his accounting the injuries and loss of life that would have been prevented if he had not delayed the rule, as well as the squandering of agency and judicial resources occasioned by his meddling on behalf of the auto industry.

Congress enacted the TREAD Act in November 2000, following the recall of over 14 million Bridgestone/Firestone tires due to tread separation. The Act directed NHTSA to complete a rule *within one year* to require a warning system in new vehicles that would indicate when a tire is significantly underinflated. NHTSA issued a proposed rule for public comment in July, 2001 and submitted a draft final rule to OMB in December, 2001. The final rule would have allowed either direct or indirect systems for an interim period, but required that direct tire pressure monitoring systems be installed on all new vehicles after November 1, 2006. Direct systems can detect underinflation in any of four tires all of the time. Indirect systems are capable of detecting underinflated tires only 50 percent as frequently as direct systems.

On February 12, 2002, Dr. Graham sent the final rule back to NHTSA. Performing the type of analytical leap that characterizes regulatory accounting, Dr. Graham told the agency "[W]e believe that an incentive to install anti-lock brakes should be considered as part of the regulatory solution" and noted that "[a]llowing indirect systems as well as direct systems effectively reduces the cost of installing anti-lock brakes by 22 percent."²⁷

When NHTSA reissued its final rule in June 2002, it did not explicitly adopt Dr. Graham's suggested rationale for maintaining the considerably less effective indirect system. Rather, NHTSA properly pointed out that the TREAD Act directs the agency to

²⁶ *Public Citizen v. Mineta*, 340 F.3d 39 (2nd Cir. 2003).

²⁷ February 12, 2002, "Return Letter,"

http://www.whitehouse.gov/omb/inforeg/return/dot_revised_tire_rtnltr.pdf.

address tire safety, and noted that there is no reason to believe either that allowing indirect systems would lead to an increase in installation of anti-lock brakes or that anti-lock brakes reduce fatalities. Nevertheless, the agency backed down from its earlier decision to require that the fully effective direct systems be installed in all new cars after November 1, 2006. The post-OIRA version of the rule had no requirements for vehicles manufactured after October 31, 2006. Instead, NHTSA stated that: “[I]t is possible that the agency may obtain or receive new information that is sufficient to justify a continuation of the options established by this first part of this rule ...”²⁸

This failure to complete the task assigned to the agency by Congress earned accolades from Dr. Graham, who wrote the agency that “OIRA appreciates the significant improvements NHTSA made in the regulatory analysis” and, ominously, that “OIRA wants to work closely with NHTSA to develop analysis sufficient to inform and support NHTSA’s ultimate decision.”²⁹ No mention was made of the egregious delay in implementing this lifesaving mandate from Congress. According to NHTSA’s own figures, such delay has contributed to the needless deaths of 79 people, as well as thousands of unnecessary injuries, each year.

The Court that vacated the TPMS rule found that OIRA’s interference had caused the agency to violate the intent of Congress by promulgating a rule that permitted either of two systems, despite the fact that one was 50 percent less safe than the other. In its decision, the Court reminded NHTSA that “cheapest is best” is contrary to Supreme Court precedent and that the agency is supposed to “place a thumb on the safety side of the scale.”³⁰

Though others recognized the ruling as a significant rebuke to Dr. Graham and a repudiation of OMB/OIRA’s insistence on analysis of every conceivable alternative, Dr. Graham chose publicly to characterize the decision as an endorsement of cost-effectiveness analysis, telling a reporter “We were encouraged that the court recognized an important role for cost-effectiveness analysis in safety regulation.”³¹

2. The Hours of Service Rule

Congress enacted the Motor Carrier Safety Improvement Act in 1999 due to the considerable alarm over mounting truck-crash fatalities, administrative delay in revising rules governing truck drivers’ hours of service, and lax enforcement of existing regulations. The Act directs the Federal Motor Carrier Safety Administration [FMSCA] to “consider the assignment and maintenance of safety as the highest priority.”³²

²⁸ 67 Fed. Reg. at 38704..

²⁹ June 28, 2002 letter from John D. Graham, Ph.D., Administrator, OIRA to Hon. Jeffrey W. Runge, M.D., Administrator, NHTSA

³⁰ *Public Citizen v. Mineta*, 340 F.3d 39, [get quote cite], (2nd Cir. 2003).

³¹ Cindy Skrzycki, “NHTSA Tries to Deal with the Pressure - Again,” *Washington Post*, September 23, 2003.

³² 49 U.S.C. §113(b).

Prior rules limited consecutive driving hours to 10 and required 8 off-duty hours, but allowed the off-duty time to be taken in split shifts if the driver rested in the truck's sleeper berth. The rules allowed work/rest cycles as short as 18 hours if drivers maximized driving time. In 2001, 409,000 large trucks were involved in crashes; truck crashes killed 5,082 people and injured 131,000.

Over a period of years, the agency accumulated research documenting the importance of uninterrupted blocks of sleep and the need for rest periods that accommodate the human body's 24-hour circadian rhythms, the widespread practice in the industry of falsifying logbooks, and the relationship between crash risk and hours of service violations. On the basis of this research, when FMCSA issued a notice of proposed rulemaking, it proposed allowing 12 on-duty hours, a minimum of 10 hours off-duty and a weekly recovery period of two nights and the intervening day, abolished split sleep schedules for solo drivers, and a requirement for electronic onboard recorders to verify compliance.

Using the grisly calculus of cost-benefit analysis, FMCSA estimated that its proposed rule would have benefits of "\$6.8 billion," that is, 115 fewer fatalities and 2,995 fewer injuries annually. Because of the need for additional drivers, cost estimates were substantial, but the rule was projected to have enormous net benefits of approximately \$3.4 billion over a period of ten years.³³

The final rule that was issued on April 28, 2003 ignored the Congressional mandate and abandoned virtually every precept of the notice of proposed rulemaking. Incredibly, the rule still increased the number of permitted driving hours (from 10 to 11), increased the weekly driving time by 26-28 percent, abandoned the proposed system recognizing the need for a 24 hour circadian schedule, reduced the number of needed long-haul drivers by 58,500, did not require onboard electronic recorders, and fattened the trucking industry's bottom line by \$1 billion annually.

Furthermore, although FMCSA is required by statute to ensure that driving "does not have a deleterious effect on the physical condition" of drivers, the final rule does not satisfy, or even acknowledge, this mandate.³⁴ The key question is: how did FMCSA move from trying to improve public safety to keeping rolling sweatshops on the highways?

The regulatory impact analysis (RIA) was outsourced to an independent contractor who met with industry representatives, but not safety organizations. The RIA excluded from its analysis the safety effects of increased daily and weekly driving hours. In legal briefs, FMCSA attempts to explain this away by claiming that it was reasonable to disregard the effect of time-on-task because there is no reliable data on the effect of driving 11 consecutive hours.

³³ 65 FR 25567, *et seq.*, May 2, 2000.

³⁴ 49 U.S.C. §31136(a)(4).

But the reason there is no such data is because the law has prohibited truckers from driving more than 10 hours for decades. While many drivers did exceed the legal limit because of the built-in incentive of the industry's pay per mile-driven model, they certainly did not reflect this in their records or participate in research. Yet increasing the number of driving hours increases the exposure of every driver to additional crashes as research shows. Concern for industry productivity was allowed to trump both driver health and public safety.

FMCSA failed to include the RIA document in the public docket until after the rule was issued, thus denying the public any opportunity to comment on its faulty assumptions and unjustified conclusions. Public Citizen has since sued the agency on the merits of the rule and the case is now pending in federal court.

B. OIRA is Pressuring Agencies to Alter Draft Rules to Decrease Public Health and Safety Protections.

A recent report by the U.S. General Accounting Office [GAO] has documented the effect of OIRA's pre-publication review of new rules over a one year period from July 2001 through Jun 2002.³⁵ GAO examined 85 health, safety and environmental rules that were changed, returned, or withdrawn at the point of OIRA review and found that OIRA had significantly affected 25 of the m. Among the effects of OIRA's intervention were the following:

- EPA delayed the compliance date for states to report on two types of emissions.
- EPA deleted provisions covering marine and highway motorcycle engines from a proposed rule on emissions from nonroad large spark-ignition engines.
- EPA eliminated manganese from the list of hazardous constituents in a hazardous waste rule.
- EPA lowered the performance standards of its proposed rule on pollutant discharge elimination systems at existing power generating facilities.³⁶

The full effect of OIRA's intervention cannot be known. GAO found that clear and complete documentation of all the elements required by E.O. 12866 was available for only 45 - 65 percent of the rules examined.

C. Scores of Public Health, Safety and Environmental Protections Have Been Rolled Back, Weakened, or Delayed.

Scores of regulations that were benefiting Americans were rescinded, weakened or delayed over the last three years. Yet, in OMB's reports to Congress there is no accounting for these deregulatory actions that have affected critical safeguards designed to prevent the destruction of the ozone layer, reduce air pollution linked to asthma attacks, bronchitis, heart disease and premature deaths, prevent neurological harm to

³⁵ U.S. General Accounting Office, "Rulemaking, OMB's Role in Reviews of Agencies Draft Rules and the Transparency of Those Reviews," GAO-03-929 (2003).

³⁶ Id., pp. 76-77.

children, reduce public exposure to toxins and contaminants, protect the natural landscape, preserve crucial habitat for endangered species, provide clean drinking water, prevent flooding, and protect workers from occupational disease and injury. A partial listing of these deregulatory actions includes:

Public Health Protections

- Weakening New Source Review Rules, allowing coal-fired power plants to increase their emissions.
 - Air pollution from power plants triggers asthma attacks, bronchitis, and heart disease, and contributes to about 30,000 premature deaths a year.
- Failing to set emissions standards for mercury produced by chlorine plants.
 - Mercury is a potent neurotoxin that especially threatens the brains and nervous systems of fetuses and young children. A number of neurological diseases and problems are linked to mercury exposure, including learning and attention disabilities, and mental retardation.
- Lifting the ban on the sale of land contaminated with polychlorinated biphenyls (PCBs).
 - PCBs are recognized by the government as probable carcinogens, and studies have found them to damage the liver, kidney, stomach and thyroid gland.³⁷
 - It will be more difficult to track the sale of contaminated sites and to ensure that buyers don't spread contamination by developing property before it is cleaned up.
- Seeking exemptions from the Montreal Protocol on Substances that Deplete the Ozone Layer for Methyl Bromide.
 - The treaty aims at phasing out substances destroying the ozone layer, which protects the earth from ultraviolet radiation which can lead to health problems such as skin cancer, cataracts, and suppression of the immune system.
- Creating only a weak proposal to limit diesel emissions from ships and tankers.
 - These vessels are a growing source of air pollution around coastal cities, producing about 273,000 tons of nitrogen oxide per year. Nitrogen oxides can harm the environment by contributing to acid rain formation, which harms buildings, lakes, streams and plant communities.
- Blocking protection of soil and drinking water from manganese.
 - Manganese is an industrial by-product linked to numerous health problems, including respiratory problems, nervous system issues, mental and emotional disturbances, as well as manganism, a disease with symptoms similar to Parkinson's.
- Relaxing Standards for Nursing Home Care.
 - The rule allows workers with only one day of training to assist residents in eating and drinking.

Food Safety Protections

³⁷ OMB Watch, *EPA Allows Sales of PCB-Contaminated Sites* (September 8, 2003), available at: <http://www.ombwatch.org/article/articleview/1781/1/4/>; Agency for Toxic Substances and Disease Registry, *Public Health Statement for Polychlorinated Biphenyls (PCBs)* (November, 2000), available at: <http://atsdr1.atsdr.cdc.gov/ToxProfiles/phs8821.html>.

- Making it easier for food companies to claim that their products help prevent, treat or cure disease.
- Lifting requirements that foods with olestra state that the substance can cause stomach problems.
 - The FDA has logged more complaints—close to 20,000—about olestra than it has about all other food additives in history combined.
 - The cases submitted to the FDA include “[R]eports of diarrhea, fecal incontinence, cramping, bleeding ... Several of the victims required hospitalization, surgery, or other invasive or expensive procedures like colonoscopies.”³⁸
- Delaying and then refusing to issue an effective standard to control listeria.
 - Listeria is a dangerous food borne bacterium often found in ready-to-eat foods that can lead to death, meningitis, miscarriages and premature births.

Clean Water Protections

- Weakening environmental protections for hard rock mining.
 - According to EPA, the hard-rock mining industry was the largest toxic polluter in 2000, producing 3.4 billion pounds of toxic pollutants that year.³⁹ The industry has polluted 40 percent of Western watersheds.
- Changing the definition of “fill material” under the Clean Water Act to allow coal mining companies to dump dirt and rock waste into rivers and streams.
 - The valley-fills created by mountaintop removal bury streams and aquatic habitat under piles of rubble hundreds of feet high, destroying the entire surrounding ecosystem and often creating floods that destroy neighboring communities.
- Not limiting construction runoff.
 - Construction runoff accounts for 55 percent of the pollution in coastal waters and 46 percent in estuaries. It is the leading cause of beach closures and advisories. EPA estimates that construction sites annually discharge 80 million tons of solids into US waterways.
- Issuing only very weak rules addressing pollution from factory farms.
 - Factory farms produce around 2.7 trillion pounds of waste per year. Often this waste leaks into rivers and streams, contaminating drinking water and spreading disease. Hog, chicken and cattle waste has polluted 35,000 miles of rivers in 22 states and contaminated groundwater in 17 states.⁴⁰
- Relaxing nationwide permit requirements, making it easier to claim that developing on wetlands will have no adverse effects on the environment.
 - The new rules promote the destruction of wetlands, which filter pollutants from water, mitigate flood damage, and provide critical habitat for thousands of species—many of which are threatened or endangered.

³⁸ Center for Science in the Public Interest, *New Olestra Complaints Bring Total Close To 20,000—More Than All Other Food Additive Complaints In History Combined* (April 16, 2002), available at: http://www.cspinet.org/new/olestrapr_041602.html.

³⁹ EPA Toxic Release Inventory.

⁴⁰ Sierra Club, *Clean Water and Factory Farms*, available at: <http://www.sierraclub.org/factoryfarms/> (last visited February 20, 2004).

Public Lands Protections

- Exempting the Tongass National Forest from the Roadless Rule.
 - Roadless areas are havens for fish and wildlife, whose habitat in many other forest areas has been fragmented or entirely destroyed. They provide habitat for threatened, endangered or sensitive plant and animal species, and include watersheds that supply clean drinking water, unpolluted by development.
- Further opening public land for the dumping of mining waste by concluding that there is no limit to the number of five-acre mill sites that each 20-acre mining claims can use.
- Allowing the continued use of snowmobiles in Yellowstone and Grand Teton National Parks.
 - Impacts include haze at Old Faithful, more engine noise, health problems for employees and visitors with sensitive respiratory systems, and chronic disruption of wildlife.

Worker Safety Protections

- Weakening protections for miners exposed to diesel particulate matter.
 - Miners' high exposure puts them at excess risk of a variety of adverse health effects, including lung cancer.
- Weakening the requirements for recording hearing loss.
 - OSHA estimates that 135,000 fewer cases will be recorded each year, denying workers and employers an important tool for identifying and preventing work-related hearing loss.
- Abandoning a rulemaking that would have required employers to protect workers from tuberculosis.

III. Instead of Inviting Nominations for a New Regulatory “Hit List,” OIRA Should Make it Easier for Agencies to Issue the Many Health and Safety Protections Whose Need Has Already Been Identified.

In 2001, when OIRA invited the public to nominate regulations for rescission or change, its motivation was totally political. Of the 23 “nominations” that OMB labeled “high priority,” 14 came from the corporate-funded Mercatus Center alone. Now, at a time when the disappearance of manufacturing jobs has become a heated political issue, OIRA is soliciting nominations for a new “hit list” of regulations that affect manufacturing. Stripping American workers and the American public of hard-won health, safety and environmental protections is not sound manufacturing policy.

Instead of cynically using the very real issue of job loss as an occasion to further its anti-regulatory agenda, OIRA should be pushing for enhanced health and safety protections and making a priority of regulatory actions that save lives.

For example, although motor vehicle crashes are the leading cause of death for Americans aged 4 to 34, OMB has remained largely silent on this key priority, and has even undermined pending rules, as discussed above. Yet automobile crashes cost 260

billion dollars a year in lost productivity and other direct costs in year 2000 dollars, or \$802 for every man, woman and child in America. And these numbers omit the incalculable suffering of family and friends. NHTSA does not, as a practice, place a dollar value on human life.

There are key safety standards which could reduce these astounding costs and unneeded suffering. Below is a list of some of the long-standing needs which should be addressed by new safeguards, particularly given the burgeoning population of sports utility vehicles and pick-up trucks as vehicles for family transportation:

- An occupant ejection safety standard that takes into account advanced window glazing, side curtain and side impact airbags and increases the strength of door locks and latches.
- A vehicle compatibility safety standard, including a standard rating metric to evaluate vehicle mismatch and to increase the compatibility of all passenger vehicles by establishing compatible bumper heights and mitigating harm done by “aggressive” design.
- A rollover crashworthiness safety standard, including a dynamic roof strength standard that requires improved seat structure and safety belt design (including belt rollover pretensioners), side impact head protection airbags and roof injury prevention padding.
- A rollover prevention safety standard to increase vehicle resistance to rollover.
- The coverage of 15-passenger vans by all NHTSA safety standards applicable to light trucks and SUVs and inclusion in the New Car Assessment Consumer Information Program.

Instead of helping to ensure that these protections are enacted, the Statement of Administration Policy on the pending transportation bill signed by Secretary Mineta is on record as opposing all of them on cost-benefit grounds. The Administration’s anti-regulatory bias, and hypocrisy when it comes to lifesaving rules, could not be more clear. Yet these proposals address a major problem: 10,600 lost lives a year, or 25 percent of all highway deaths, result from rollover crashes.

It is particularly ironic that crash-mitigation and prevention rules would meet with such opposition, when comparative studies by Dr. Graham and others repeatedly highlight injury prevention measures as the most cost-effective type of rules. Where industrial interests may be disserved by these conclusions, however, it appears that they are quickly and conveniently shunted aside.

IV. Conclusion

If OIRA does proceed with its compilation of a new regulatory hit list, it should, at a minimum, require that any nomination of a rule for modification or rescission must be accompanied by an analysis of the effect of the proposed rule change on public health, safety and the environment.

Most importantly, however, we hope that the dubious practice of regulatory accounting is soon resigned to the dustbin of history, where it belongs. Its intellectual pretense at objectivity is little more than pretense. It does not bear up under scrutiny of any rigor, and has only been perpetuated by academic fraud on the part of self-interested corporate front groups and mouthpieces. The bare language of economics turns out to be a very impoverished substitute for the morally rich and democratic discourse and consensus which gives rise to health, safety and environmental protections.

We must never forget that cost-benefit analysis, where applied, comes very late in the process. Enormous and substantial proof of ongoing harm and risk to life and health has propelled action by Congress or the regulatory agencies. Factual testimony and hearings, agency dockets and public discussion, media investigations, and the experience of thousands or even millions of Americans has been the driving force for development of a remedy. In the face of such evidence, the cost-benefit sophists still maneuver to defeat or delay the public good. Neither Congress nor the American people should be fooled.